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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Calaveras)

LAWRENCE J. SARKIS, Plaintiff and Respondent, v. ANGELS GUN CLUB et al., Defendants and Appellants.	C081782 (Super. Ct. No. 14CV40119)
LAWRENCE J. SARKIS et al., Plaintiffs and Respondents, v. ANGELS GUN CLUB et al., Defendants and Appellants.	C081786 (Super. Ct. No. 14CV40365)

THE APPEAL

We review in these appeals the trial court's disqualification of appellants' counsel. Defendant and appellant Angels Gun Club expelled plaintiff and respondent Lawrence J. Sarkis from its membership. Sarkis sued the club and one of its directors directly for personal damages and, in a separate action, sued the club and almost all its directors derivatively. On Sarkis's motions, the court disqualified the appellants' counsel in both actions, finding counsel had a conflict of interest that had not been properly waived.

We reverse the trial court's order in the direct action, as Sarkis had no standing to disqualify counsel in that matter. We affirm the court's order in the derivative action, as counsel has a conflict of interest that cannot be waived.

FACTS AND PROCEEDINGS

Angels Gun Club is a California nonprofit mutual benefit corporation. It expelled Sarkis as a member in April 2014.

Sarkis sued the club and one of its directors, David VerHalen. He alleged the club wrongfully expelled him in violation of the California Corporations Code and the club's bylaws. It also wrongfully expelled him in retaliation for his accusations of misconduct by directors; specifically, that the board took no action to prevent theft of money and ammunition after such thefts had been reported, certain directors misappropriated funds, the club had not implemented financial controls and reporting tools at the risk of losing its nonprofit status, and the club was allowing gambling on its premises in violation of its liquor permit. Sarkis also alleged the club's directors violated their fiduciary duties by not investigating his suspension and taking corrective action on his allegations, and certain of them had a conflict of interest when they considered his expulsion.

Sarkis also alleged VerHalen breached his fiduciary duty and his duty to act in good faith as a director by willfully acting and conspiring with other directors to see that Sarkis was expelled.

Attorney Christopher Egan of the law firm Porter Scott (collectively Porter Scott) filed an answer on behalf of the club and VerHalen.

Approximately two months later, Sarkis and other club members, including two directors, filed a derivative action against the club and the remaining 15 of its 17 directors, including VerHalen. The derivative plaintiffs alleged the directors breached their fiduciary duties by the actions and omissions that Sarkis had alleged in his direct action. Prior to filing the complaint, the derivative plaintiffs demanded the board of directors pursue the action on behalf of the club, but the board refused.

Before the derivative defendants responded to the complaint, the derivative plaintiffs filed a motion to disqualify Porter Scott from representing any of the derivative defendants in the derivative action. Plaintiffs contended an "unwaivable" conflict of interest existed between the club, for whose benefit the derivative action was brought, and the individual directors named as derivative defendants. According to plaintiffs, Porter Scott's representation of the club and the individual directors violated former rules 3-310 and 3-600 of the California Rules of Professional Conduct.

Plaintiffs argued the conflict of interest could not be waived. Under former rule 3-600, wavier cannot be made by those being represented in the action. Because 15 of the club's 17 directors were derivative defendants and the other two directors were, at the time, derivative plaintiffs, there was no one with authority to waive the conflict.

After the derivative plaintiffs filed their motion to disqualify, Porter Scott filed an answer in the derivative action only on behalf of the club. The Levangie Law Group filed an answer on behalf of the individual directors.[1]

Approximately six weeks after the derivative plaintiffs filed their motion to disqualify Porter Scott in their action, Sarkis filed a motion in his direct action to

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[1] By this time, the two director plaintiffs in the derivative action had voluntarily dismissed their causes of action.

disqualify Porter Scott from representing the club and VerHalen in that action. He raised the same grounds in support of disqualifying Porter Scott in his action as the derivative plaintiffs raised in the derivative action.

The trial court granted both disqualification motions. The court noted that Porter Scott had filed an answer in the direct action on behalf of the club and VerHalen, and that the complaints in both actions contained similar allegations. Although the firm admitted a conflict could possibly exist because of its representation of VerHalen in the direct action, it contended any conflict had been waived by VerHalen and a majority of the board. The court disagreed, ruling that because of the nature of the derivative action, all board members had to waive the conflict. The court ruled that short of a waiver by each board member, "any waiver fails to remove the appearance of potential conflict associated with continued involvement of Porter Scott in either matter."

The defendants in both actions filed motions for reconsideration. The motions included declarations from Egan, VerHalen, the club's president of the board of directors, 11 other defendant directors, three non-party current directors, and counsel representing the individually named directors in the derivative action. All stated a conflict never existed and there was never opposition to Porter Scott representing the club and VerHalen in the direct action and the club in the derivative action. The president testified he signed a written waiver in favor of Porter Scott representing the club and VerHalen in the direct action and the club in the derivative action.

The trial court denied reconsideration. It reasoned that due to the unique nature of a derivative action and the effect of rule 3-310(c) of the Rules of Professional Conduct, all board members had to waive Porter Scott's potential conflict of interest. Despite the number of declarations submitted, defendants did not establish that all board members provided waivers. The court also ruled the declarations did not qualify as new evidence justifying reconsideration, as the facts they discussed were known at the time of the hearing on the original motions to disqualify.

The club and VerHalen appeal from the court's orders. We have consolidated the appeals for purposes of argument and decision.

DISCUSSION

I

Standard of Review

"Generally, a trial court's decision on a disqualification motion is reviewed for abuse of discretion. [Citations.] If the trial court resolved disputed factual issues, the reviewing court should not substitute its judgment for the trial court's express or implied findings supported by substantial evidence. [Citations.] When substantial evidence supports the trial court's factual findings, the appellate court reviews the conclusions based on those findings for abuse of discretion. [Citation.] However, the trial court's discretion is limited by the applicable legal principles. [Citation.] Thus, where there are no material disputed factual issues [such as in this case], the appellate court reviews the trial court's determination as a question of law. [Citation.] In any event, a disqualification motion involves concerns that justify careful review of the trial court's exercise of discretion." (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1143-1144.)

II

Standing in the Direct Action

The club and VerHalen contend Sarkis does not have standing in the direct action to seek to disqualify Porter Scott. We agree.

" 'Standing generally requires that the plaintiff be able to allege injury, that is, an invasion of a legally protected interest. [Citation.] A "standing" requirement is implicit in disqualification motions. Generally, before the disqualification of an attorney is proper, the complaining party must have or must have had an attorney-client relationship

with that attorney.' (*Great Lakes Construction, Inc. v. Burman* (2010) 186 Cal.App.4th 1347, 1356.) ' "The burden is on the party seeking disqualification to establish the attorney-client relationship." ' (*Shen v. Miller* (2012) 212 Cal.App.4th 48, 56-57.)" (*Coldren v. Hart, King & Coldren, Inc.* (2015) 239 Cal.App.4th 237, 245.)

Sarkis has never had an attorney-client relationship with Porter Scott. There is no evidence he ever exchanged confidential information with the firm or that the firm owed him any duty of loyalty or confidentiality. He makes no argument that he has a legally cognizable interest in the duty of loyalty Porter Scott owes its clients or any duty of confidentiality the firm owes him. Indeed, in his respondent's brief, he admits the "real conflict" is not with him. He states, "Other than the fact that he is one of the derivative plaintiffs in the derivative action . . . , Sarkis himself does not enter into the conflict analysis in the direct action."

Nonetheless, he contends he has standing to move to disqualify Porter Scott in the direct action. He claims we should hold he has vicarious standing to assert the club's rights in the direct action because he has vicarious standing to do the same in the derivative action. The 15 directors named as defendants in the derivative action are alleged in the direct action to have violated the same fiduciary duties, yet Porter Scott is defending them in the direct action but aligned against them in the derivative action. Sarkis contends that if we do not recognize his vicarious standing, the club's right to independent counsel would be unenforceable as a practical matter. Public policy, he argues, requires that a derivative plaintiff have the same vicarious standing in a separate related case.

We are not persuaded. In a derivative action, standing to seek disqualification of the corporation's attorney is imputed vicariously to the plaintiff. "Any other rule would run the risk of rendering an organization defenseless when it is most vulnerable, i.e., when it is represented by an attorney who has a conflict because he also represents and is

beholden to a company insider who injured the company." (*Blue Water Sunset, LLC v. Markowitz* (2011) 192 Cal.App.4th 477, 486, fn. omitted.)

Sarkis has vicarious standing in the derivative action because he brought that action to *enforce* the club's interests. In the direct action, he is *opposed* to the club's interests. It would be unfair and would violate a party's right to independent counsel if the law granted Sarkis, suing in his individual capacity and with no prior or current relationship with Porter Scott, the right to determine who may represent his adversaries.

Whether the club and VerHalen will be harmed by any breach of loyalty by Porter Scott in the direct action does not concern Sarkis. That the two cases are related makes no difference. Sarkis's role in the derivative action on behalf of the club does not give him a legal interest in the duty of loyalty Porter Scott owes the club and VerHalen in the direct action. Because he personally has no cognizable legal interest in the duty Porter Scott owes its clients, he lacks standing to seek to disqualify the firm in the direct action. We reverse the trial court's order in that matter.

III

Conflict of Interest in the Derivative Action

The club contends the trial court erred when it disqualified Porter Scott from representing it in the derivative action. It claims Porter Scott has no actual or potential conflict of interest in that action because it represents only the club, and the directors have separate counsel. It also argues that by representing the club in its limited capacity as a nominal defendant, Porter Scott does not violate any duty of loyalty or confidentiality it owes to the club or VerHalen arising from representing them in the direct action. To the extent there may be a conflict due to the firm representing the club and VerHalen in the direct action, those two parties expressly waived any conflict. The club argues the trial court had no legal authority to require all 17 of the club's directors to waive a conflict.

Sarkis disagrees. He claims Porter Scott violated its duty of loyalty to the club when, while already representing the club and VerHalen in the direct action, it undertook representing the club in the derivative action in which VerHalen was named as a defendant. In the derivative action, the law considers the club, although named as a nominal defendant, to be the plaintiff. Thus, the firm's interests are conflicted by representing the club in the derivative action against one of the firm's clients.

Sarkis acknowledges Porter Scott, as counsel for the club in the derivative action, must remain neutral and cannot contest the action on the merits. (*Patrick v. Alacer Corp.* (2008) 167 Cal.App.4th 995, 1005.) Yet he contends the firm cannot remain neutral because VerHalen is its client in the direct action and, as a result, the duty of loyalty requires the firm to "protect and advocate" VerHalen's interests in both the direct and the derivative actions. Sarkis claims Porter Scott cannot represent the club's interests in the derivative action against VerHalen while simultaneously representing VerHalen in the direct action because the derivative action seeks to recover for damage done to the club by VerHalen and the other directors.

We conclude the trial court did not abuse its discretion when it disqualified Porter Scott in the derivative action.

"We begin by setting forth the legal principles governing the disqualification of an attorney based on a conflict. ' "A conflict of interest exists when a lawyer's duty on behalf of one client obligates the lawyer to take action prejudicial to the interests of another client; i.e., 'when, in behalf of one client, it is his *duty to contend for that which duty to another client requires him to oppose.*' " ' (*Havasu* [*Lakeshore Investments, LLC v. Fleming* (2013) 217 Cal.App.4th 770,] 778 [(*Havasu*)].)" (*Coldren v. Hart, King & Coldren, Inc., supra*, 239 Cal.App.4th at p. 248, original italics.)

An "adverse" interest is one that is "hostile, opposed, antagonistic" or "detrimental, unfavorable" to one's interests. (*Ames v. State Bar of California* (1973) 8 Cal.3d 910, 917.)

The California Rules of Professional Conduct restrict when a lawyer may represent clients with conflicting interests. Rule 1.7 reads:

"(a) A lawyer shall not, without informed written consent from each client . . ., represent a client if the representation is directly adverse to another client in the same or a separate matter.

"(b) A lawyer shall not, without informed written consent from each affected client . . ., represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person, or by the lawyer's own interests."

"[I]n parsing the effect of the ethical principle against attorney-client conflicts of interest in a variety of settings, the courts have identified two separate interests underlying the prohibition and formulated two distinct tests to determine the circumstances in which each applies.

"Where the potential conflict is one that arises from the *successive* representation of clients with potentially adverse interests, the courts have recognized that the chief fiduciary value jeopardized is that of client *confidentiality*. Thus, where a former client seeks to have a previous attorney disqualified from serving as counsel to a successive client in litigation adverse to the interests of the first client, the governing test requires that the client demonstrate a '*substantial relationship*' between the subjects of the antecedent and current representations. [¶] . . . [¶]

"Both the interest implicated and the governing test are different, however, where an attorney's potentially conflicting representations are *simultaneous*. In such a situation . . . the courts have discerned a distinctly separate professional value to be at risk by the attorney's adverse representations. The primary value at stake in cases of simultaneous or dual representation is the attorney's duty—and the client's legitimate expectation—of *loyalty*, rather than confidentiality. . . .

"In evaluating conflict claims in dual representation cases, the courts have accordingly imposed a test that is more stringent than that of demonstrating a substantial relationship between the subject matter of successive representations. Even though the simultaneous representations may have *nothing* in common, and there is *no* risk that confidences to which counsel is a party in the one case have any relation to the other matter, disqualification may nevertheless be *required*. Indeed, in all but a few instances, the rule of disqualification in simultaneous representation cases is a *per se* or 'automatic' one. . . .

"The reason for such a rule is evident, even (or perhaps especially) to the nonattorney. A client who learns that his or her lawyer is also representing a litigation adversary, even with respect to a matter *wholly unrelated* to the one for which counsel was retained, cannot long be expected to sustain the level of confidence and trust in counsel that is one of the foundations of the professional relationship. All legal technicalities aside, few if any clients would be willing to suffer the prospect of their attorney continuing to represent them under such circumstances. As one commentator on modern legal ethics has put it: 'Something seems radically out of place if a lawyer sues one of the lawyer's own present clients in behalf of another client. Even if the representations have nothing to do with each other, so that no confidential information is apparently jeopardized, the client who is sued can obviously claim that the lawyer's *sense of loyalty* is askew.' (Wolfram, Modern Legal Ethics (1986 ed.) § 7.3.2, p. 350, italics added.) It is for that reason, and not out of concerns rooted in the obligation of client confidentiality, that courts and ethical codes alike prohibit an attorney from simultaneously representing two client adversaries, even where the substance of the representations are unrelated." (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 283-285, original italics, fns. omitted.)

Generally, a lawyer representing a corporation may also represent any of the corporation's officers or directors upon the clients' written consent. (*Havasu, supra,*

217 Cal.App.4th at p. 777.) However, the lawyer may not concurrently represent a corporation and one of its officers or directors if there is an actual conflict between their interests. "Case law has established certain principles governing an attorney's ability ethically to simultaneously represent an organization and one or more of its constituents. For example, counsel may not represent a corporation and its management when they have adverse, conflicting interests. (*Gong* [*v. RFG Oil, Inc.* (2008) 166 Cal.App.4th 209,] 214.) '[O]nce a conflict has arisen between a corporation and one or more of its officers, directors or shareholders, corporate counsel may not simultaneously represent the corporation and the adverse officer, director or shareholder.' (*La Jolla Cove Motel & Hotel Apartments, Inc. v. Superior Court* (2004) 121 Cal.App.4th 773, 785.)" (*Havasu, supra*, 217 Cal.App.4th at p. 778.)

Such a conflict exists in a shareholder derivative suit. " ' "The management [of a corporation] owes to the stockholders [or, as in this case, the members] a duty to take proper steps to enforce all claims which the corporation may have. When it fails to perform this duty, the stockholders have a right to do so." ' (*Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 107 . . . .) 'The shareholders may . . . bring a derivative suit to enforce the corporation's rights and redress its injuries when the board of directors fails or refuses to do so.' (*Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1108 (*Grosset*).)

"But 'the particular stockholder who brings the suit is merely a nominal party plaintiff.' (*Klopstock v. Superior Court* (1941) 17 Cal.2d 13, 21 . . . .) It is the corporation that 'is the ultimate beneficiary of such a derivative suit.' (*Ibid.*) Thus, '[t]he corporation [is] the real party plaintiff in the action.' (*Russell v. Weyand* (1935) 5 Cal.App.2d 259, 260.)

"Though the corporation is essentially the plaintiff in a derivative action, '[w]hen a derivative suit is brought to litigate the rights of the corporation, the corporation . . . must be joined as a nominal defendant.' (*Grosset, supra*, 42 Cal.4th at p. 1108.) The corporation must be joined because 'its rights, not those of the nominal plaintiff, are to be

litigated . . .' (*Beyerbach v. Juno Oil Co.* (1954) 42 Cal.2d 11, 28 . . .), and to offer the real defendants res judicata protection from later suits. (*Gagnon Co., Inc. v. Nevada Desert Inn* (1955) 45 Cal.2d 448, 453.) Naming the corporation a defendant, not a plaintiff, follows from the joinder rules . . . ." (*Patrick v. Alacer Corp.*, *supra*, 167 Cal.App.4th at pp. 1003-1004.)

" 'Thus, where a shareholder has filed an action questioning [the corporation's] management or the actions of individual officers or directors, such as in a shareholder derivative or . . . dissolution action, corporate counsel cannot represent both the corporation and the officers, directors or shareholders with which the corporation has a conflict of interest.' ([*La Jolla Cove Motel & Hotel Apartments, Inc. v. Superior Court*, *supra*, 121 Cal.App.4th] at pp. 785-786.)" (*Havasu*, *supra*, 217 Cal.App.4th at p. 778.) The interests of the corporation and the directors in a derivative action directly conflict.

Here, Porter Scott did not represent the club and VerHalen in the derivative action. VerHalen and the other defendant directors are represented by separate counsel. The club claims this separation of representation eliminates any potential conflict Porter Scott may have by representing the club in the derivative action. It contends its representation by Porter Scott does not violate any duty of loyalty or confidentiality the firm owes to either the club or to VerHalen arising from the firm's representation of those parties in the direct action. We disagree.

The California Supreme Court's statement in 1930 of an attorney's duty of loyalty to the client is still generally valid: " 'It is . . . an attorney's duty to protect his client in every possible way, and it is a violation of that duty for him to assume a position adverse or antagonistic to his client without the latter's free and intelligent consent. . . . By virtue of this rule an attorney is precluded from assuming any relation which would prevent him from devoting his entire energies to his client's interests.' (*Anderson v. Eaton* (1930) 211 Cal. 113, 116.)" (*Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 548.)

Porter Scott, by representing the club in the derivative action, places itself in a position that could prevent it from devoting its entire energies to the club's interests. As essentially the plaintiff in the derivative action, it could ultimately "decide[] to prosecute the action itself by filing a cross-complaint asserting the same claims against the other defendants . . . ." (2 Marsh's Cal. Corporation Law (4th ed. 2013) § 15.11(H), p. 15-102.1; see *Loeb v. Berman* (1933) 217 Cal. 716, 718 [shareholder plaintiffs in derivative action lacked standing to appeal where corporation filed cross-complaint on the same cause of action].)

But because of its existing relationship with the directors, Porter Scott may not zealously seek to pursue the club's interests against them. We and the parties found no reported opinion directly on point, but the court in *Forrest v. Baeza* (1997) 58 Cal.App.4th 65 (*Forrest*), foresaw this conflict on the facts before it. There, an auto towing company and one of its three shareholders, Michael Forrest, sued a former shareholder. Forrest and the company were represented by attorney McKim. The former shareholder filed a cross-complaint against Forrest, his wife, who was the second shareholder, and the third shareholder, Ritch Ricetti. McKim filed an answer for the three shareholders. Months later, Ricetti obtained a new attorney. (*Id*. at pp. 68-69.)

Forrest, his wife, and the towing company then filed an action against Ricetti and the former shareholder. Ricetti filed a cross-complaint against the plaintiffs and an additional corporation they owned, later amending it to include a derivative action. (*Forrest, supra*, 58 Cal.App.4th at pp. 69-70, 72.) Ricetti moved to disqualify McKim from representing the Forrests and the corporations. (*Id*. at pp. 70-72.) The trial court granted the disqualification motion as to McKim's representation of the corporations but denied it as to his representation of the Forrests. (*Id*. at p. 72.)

The court of appeal affirmed the trial court's rulings. It found the trial court correctly disqualified McKim from representing the corporations because, as the actual plaintiffs in the derivative action, they stood to gain a recovery from the Forrests'

wrongful actions. "Current case law clearly forbids dual representation of a corporation and [its] directors in a shareholder derivative suit, at least where, as here, the directors are alleged to have committed fraud." (*Forrest, supra*, 58 Cal.App.4th at p. 74.)

The *Forrest* court also found the trial court correctly allowed McKim to continue representing the Forrests. The court of appeal found the trial court's ruling was consistent with federal authority in shareholder derivative actions that prohibited dual representation of the corporation and the defendant directors but authorized the attorney who formerly represented both clients to continue representing the individual directors. (*Forrest, supra*, 58 Cal.App.4th at p. 80.)

The court of appeal explained the reasoning behind the federal decisions and, of relevance here, why counsel could not represent the corporation: "The reasoning reflected in these decisions is somewhat more extensively addressed in commentary discussing whether the problem of dual representation in the shareholder derivative suit context is better solved by requiring independent counsel for the corporation or for the individual defendants. One author stated: 'An alternative solution [to requiring independent counsel for the corporation] might be to require the *insiders* to secure new counsel, thus permitting the corporation to retain its original counsel. But while this procedure removes the outward appearances of dual representation, the substance of the wrong remains. A residual bias in favor of the individual defendants might continue to undermine counsel's judgment. This potential bias would stem from the fact that counsel's first loyalty might remain with the directors and officers of the corporation, who have been his principal contact with the inanimate corporate client in the past. In addition, counsel might fear that rendering advice antagonistic to the insiders' interests would impair future relations with his corporate client. For these reasons, the . . .decision [in *Lewis v. Shaffer Stores Co.* (S.D.N.Y. 1963) 218 F.Supp. 238, 239] to have the corporation secure new counsel seems the sounder alternative.' (Comment, *Independent Representation for Corporate Defendants in Derivative Suits* [(1965) 74 Yale L.J. 524,]

533-534.) To similar effect: 'It has been suggested that the outside lawyer . . . represent the individual defendants, perhaps as another means of ensuring that their legal fees are not borne by the corporation. The better rule is to require that outside counsel represent the corporation, while the corporate attorney represents the insider defendant; the question of expenses would be decided separately. This rule recognizes that while the in house attorney is nominally the representative of the corporation, his personal loyalties will inevitably be to the [insider] executives who hired him.' (*Developments in the Law—Conflicts of Interest in the Legal Profession* [(1981) 94 Harv. L.Rev. 1244,] 1341.)" (*Forrest, supra,* 58 Cal.App.4th at pp. 80-81.)

This discussion explains the conflicting interests Porter Scott maintains by representing the club in the derivative action. Even though the individual directors are represented by independent counsel, Porter Scott has a bias in favor of the individual directors with whom the firm meets to discuss the club's affairs in the direct action. The firm may also fear that taking aggressive action in the derivative suit against the directors' interests may impair its future relationship with the club as its client. By representing the club in the derivative action, the firm has an adverse interest against one of its current clients, VerHalen, and it will inevitably favor VerHalen and the other directors at the expense of the duty of loyalty it owes the club. This adverse interest required the trial court to disqualify Porter Scott in the derivative action.

In its opening brief, the club claims there is no conflict of interest and no concurrent representation because Porter Scott has never represented Sarkis and owes no duty of loyalty to him. This argument misstates the issue before us. No one disputes that the firm owes no duty of loyalty to Sarkis. However, no one also disputes that the firm owes a duty of loyalty to both the club and VerHalen, as both are its current clients. The issue raised in this action is whether it is possible for the firm to satisfy those duties when it represents the club in the derivative action against VerHalen and the other directors.

The club argues that Sarkis is contending Porter Scott's duty of loyalty to the club requires the firm to prosecute and "attack" the individual directors in the derivative action. That is not the thrust of Sarkis's argument. Sarkis argues the firm has a duty of loyalty to the club and VerHalen arising out of the firm's representing them in the direct action. By also representing the club in the derivative action, the firm is unable to meet its duty of loyalty and protect the club's interests in the derivative action. This is because the club and VerHalen have opposing interests in that action, and the firm is biased towards VerHalen and the other defendant directors. Sarkis argues the club is entitled to unconflicted representation "without concerns about whose interests its attorney is actually representing." We agree with that statement.

The club contends there is no conflict because of its limited role in the derivative action. It and its counsel must remain neutral. It also retains authority to challenge the shareholder's decision to bring the action by moving to dismiss for lack of standing or by establishing a special litigation committee to determine whether the suit is in the corporation's best interests. These points do not obviate the conflict.

Because the club is the plaintiff, it may not oppose the derivative action on the merits. (*Patrick v. Alacer Corp.*, *supra*, 167 Cal.App.4th at p. 1005.) Its dispute with Sarkis is narrow. The only claim Sarkis has against the club in the derivative action is that the club failed to pursue the litigation. (*Id*. at p. 1004.) Fighting whether the derivative action should have been brought does not create a conflict between the club and the directors. Thus, the club can contest Sarkis's standing or it can appoint a special litigation committee of independent directors to investigate the allegations. (*Id*. at pp. 1004-1005.) The conflict arises when the action proceeds, as this one has. The club's neutrality does not eliminate the conflict in this instance because the club stands to benefit from the other individual defendants, one of whom happens to be a client of the club's law firm. (*Id*. at p. 1005.) Moreover, although the club may not defend on the merits, nothing stops it from ultimately deciding to file a cross-complaint against the

directors and take over prosecuting the action. The club's neutrality does not eliminate the conflict.

The club argues that Porter Scott's representing it in the derivative action while also representing the club and VerHalen in the direct action does not violate a duty of loyalty the firm owes to either client for several other reasons. First, there is no authority that states it does. Second, the firm had to file an answer for the club in the derivative action because the club can act only through a licensed attorney. Third, the firm owes no duty to advocate on behalf of VerHalen in the derivative action where he and the other directors are represented by independent counsel.

None of these arguments advances the club's position. The lack of direct authority does not prevent us from applying the law to the undisputed facts. That the club had to act through an attorney does not excuse the attorney from violating a duty of loyalty. And the representation of the individual directors by independent counsel does not eliminate Porter Scott's bias toward favoring the directors against what is best for the club in the derivative action.

To eliminate Porter Scott's conflicting loyalties that would detrimentally affect the club, the trial court correctly disqualified Porter Scott from representing the club in the derivative action.

IV

Waiver

Assuming a conflict exists, the club contends the trial court erred by requiring each of the club's directors to waive the conflict. The club's bylaws do not suggest the club can waive a conflict of interest only upon the unanimous vote of its 17 directors. The club argues that the written consent provided by the president of its board of directors in 2015, defendant Arthur "Sonny" Canepa, was sufficient to waive any conflict. If it was not, then the declarations filed by 13 of the 15 defendant directors and

three of the current directors in support of the club's motion for reconsideration, in which each of them attested they consented to any conflict, constituted sufficient waiver.

We disagree. Conflicts arising from dual representation involving a derivative suit cannot be waived and require disqualification per se. "Indeed, commentators and case law alike have concluded that reliance on consent is ill founded in the context of derivative litigation. Thus, in *Cannon v. U.S. Acoustics Corporation* [(N.D.Ill. 1975) 398 F.Supp. 209,] 216, footnote 10, the court stated: '[Ethical Consideration] 5-16 [of the American Bar Association's Code of Professional Responsibility] provides that in some circumstances multiple representation may be permissible if both clients are fully informed of potential conflict and the parties consent to the representation. This consent rationale seems peculiarly inapplicable to a derivative suit, because the corporation must consent through the directors, who, as in the present case, are the individual defendants. See Opinion 842, Association of the City of New York Committee on Professional Ethics (Jan. 4, 1960), 15 Record N.Y.C.B.A. 80 (1960).' . . . In *In re Oracle Securities Litigation* [(N.D.Cal. 1993) 829 F.Supp. 1176,] 1189, the court stated: 'It is also clear that an inanimate corporate entity, which is run by directors who are themselves defendants in the derivative litigation, cannot effectively waive a conflict of interest as might an individual under applicable professional rules such as [former California Rules of Professional Conduct] 3-600(e) and 3-310. [See now Rules 1.13, 1.7.]' One commentator noted: 'But it would be meaningless in derivative litigation to allow the consent of the parties defendant to exculpate the practice of dual representation, for most often it would be the defendant directors and officers who would force the corporation's consent.' (Comment, *Independent Representation for Corporate Defendants in Derivative Suits* (1965) 74 Yale Law Journal 524, 528.)" (*Forrest, supra*, 58 Cal.App.4th at pp. 76-77.)

We acknowledge this is not a case where Porter Scott is representing both the corporation and the directors in the derivative action, but the risk is the same. The

directors are the defendants in the action. They cannot be allowed to force the club's consent to further their individual and conflicting interests.

DISPOSITION

The trial court's order reviewed in C081782 that granted disqualification in the direct action is reversed. The court's order reviewed in C081786 that granted disqualification in the derivative action is affirmed.

The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(3).)

HULL, J.

We concur:

BLEASE, Acting P. J.

BUTZ, J.